SUPREME COURT, U. S.

FILED

OCT 11 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-265

JOSEPH DE LORRAINE,

Petitioner,

—against—

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EDWARD SILVER
Counsel for Respondents
300 Park Avenue
New York, New York 10022
(212) 593-9000

Of Counsel:

MORTON M. MANEKER
ROBERT J. JOSSEN
PROSKAUER ROSE GOETZ & MENDELSOHN

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Introduction 3

Statement of the Case 3

Proceedings in the District Court 5

Proceedings in the Court of Appeals 6

ARGUMENT

Plaintiff's factual claims are clearly insubstantial and do not justify the granting of the writ 7

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (1st Cir. 1968) 10

Fiorelli v. Kelewer, 339 F. Supp. 796 (E.D. Pa. 1972), *aff'd without opinion*, 474 F.2d 1340 (3rd Cir. 1973) 10

PAGE

Moses v. Ammond, 162 F. Supp. 866 (S.D.N.Y. 1958) .. 10

Sanders v. Birthright, 172 F. Supp. 895 (S.D. Ind. 1959) 10

Snider v. All State Administrators, Inc., 481 F.2d 387 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974) 10

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* 3, 5, 7

Labor Management Relations Act, as amended (Taft-Hartley Act), 29 U.S.C. §186
Section 302(c)(5) 2, 3, 4, 5, 7, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-265

JOSEPH DE LORRAINE,

Petitioner,

—against—

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The initial opinion of the District Court is reported at 355 F. Supp. 89 (S.D.N.Y. 1973). The second and third opinions of the District Court are not officially reported. The opinion of the Court of Appeals is not officially reported. All of the opinions are reproduced in the Appendix to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Did the Court of Appeals properly affirm the District Court's grant of summary judgment where plaintiff failed to raise any genuine issue of material fact but relied solely upon conclusory allegations and where the Court of Appeals assumed *arguendo* that plaintiff's legal theories could state a claim upon which relief can be granted?

2. Assuming *arguendo* that the Court of Appeals erred in summarily disposing of plaintiff's complaint, the following issues, which were never passed upon by the Court in view of the insubstantiality of plaintiff's factual claims, are presented:

a. Is a claim that the trustees of a jointly administered employer-union pension plan have violated their fiduciary duties in the administration of the plan, outside the subject matter jurisdiction of a federal district court under Section 302(c)(5) of the Labor Management Relations Act (hereafter "Taft-Hartley Act")?

b. Does the requirement of Section 302(c)(5) of the Taft-Hartley Act that a jointly administered pension trust be for the "sole and exclusive benefit of the employees" exclude a claim that trustees, acting pursuant to a pension trust which complies with all structural requirements of Section 302(c)(5), have taken actions motivated by improper considerations?

c. Does the term "labor organization" as used in the Age Discrimination in Employment Act of 1967 exclude from the Act's prohibitions a jointly administered pension trust?

d. If not, is the exemption for "bona fide . . . pension . . . plans" in the Age Discrimination in Employment Act applicable to the pension trust?

e. Does the statute of limitations contained in the Age Discrimination in Employment Act bar the instant action?

Introduction

This petition for a writ of certoriari should be denied because the Court of Appeals did not pass upon any of the legal issues with respect to which certiorari is sought in view of the Court's finding that plaintiff's factual claims were totally without evidentiary support. The record herein amply supports the Court's conclusion and demonstrates beyond question that plaintiff's factual allegations are frivolous. The refusal of the Court of Appeals to interpret and apply the two federal statutes involved and the obvious insubstantiality of plaintiff's factual claims make it clear that the instant case should not occasion review by this Court.

Statement of the Case

Plaintiff-petitioner is a marine engineer who at the age of 46 voluntarily retired from sea-going employment in the maritime industry in order to obtain a pension which the defendant MEBA Pension Trust (hereinafter "Pension Trust") made available to participants after 20 years of service, irrespective of age. Plaintiff now claims that de-

fendants violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* and Section 302 of the Taft-Hartley Act, 29 U.S.C. §186, by refusing to grant him consent to work in covered employment after his retirement, in accordance with a long-standing regulation of the Pension Trust.

At the time of his retirement in 1964 plaintiff executed a statement in which he represented that his retirement was permanent and in which he expressly recognized the Pension Trust's regulation that a return to employment without permission of the trustees would require the loss of pension benefits:

> "I, Joseph De Lorraine, hereby certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement with the Association and any employment in the Association Locals or Plans."
>
> • • • • •
>
> "A return to employment as noted above, without written permission from the Trustees, shall be penalized in accordance with MEBA Pension Trust Regulations." (A-32n.1)*

Plaintiff received his regular monthly pension for the next four years. In 1968, in response to the shipping emergency created by the Viet Nam War, the trustees adopted the practice of granting consent to any marine engineer who was willing to return from retirement to aid the war effort.

---

* References to the Appendix in the Petition are cited as "A- ."

Plaintiff took advantage of this opportunity and returned to employment.

As the Viet Nam War drew to a close in December 1970 and the emergency need for marine engineers subsided, the trustees passed a blanket resolution which withdrew the permission for *all* pensioners who had previously been permitted to return to covered employment. In accordance with this resolution plaintiff was notified that his permission to return to covered employment would be terminated as of April 1, 1971 and he ceased work in the industry. He now receives his regular pension payments.

Proceedings in the District Court

After unsuccessfully pursuing state administrative remedies,* plaintiff commenced an action in the United States District Court for the Southern District of New York. He alleged that the trustees' 1970 resolution was motivated by the union's desire to favor younger workers in the industry—and thus benefit the union by increasing moneys collected from training school and initiation fees. Such alleged improper motivation was claimed to violate the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*

The District Court (Tyler, J.) granted defendants' motion for summary judgment and dismissed the complaint. Plaintiff then was allowed to file an amended complaint in

* Plaintiff filed a charge of age discrimination under the New York State Human Rights Law with the State Division of Human Rights. The State Division of Human Rights dismissed his charge on the merits in May 1971. The State Human Rights Appeal Board affirmed the dismissal in December 1971, both on the merits and on jurisdictional grounds.

which he alleged, without any additional facts, that the trustees' uniform revocation of permission also amounted to a violation of Section 302 of the Taft-Hartley Act in that the Pension Trust, by reason of defendant trustees' alleged breach of their common law fiduciary obligations, was no longer being administered for the "sole and exclusive benefit of . . . employees . . . ." Defendants again moved for summary judgment and the District Court dismissed the amended complaint for lack of subject matter jurisdiction.

Proceedings in the Court of Appeals

The Court of Appeals for the Second Circuit affirmed the District Court's grant of summary judgment to defendant on the Age Discrimination Act claim because plaintiff failed to set forth at least "some facts to show that the blanket reinstatement of the original unattacked policy [which required a pensioner to be fully retired in order to receive benefits] was discriminatory." (A-35) It expressly declined to pass on any of the issues of statutory interpretation with respect to which petitioner seeks review in this Court.

Similarly, the Court affirmed the dismissal of the Taft-Hartley Act claims in the amended complaint because these claims factually required "very much the same showing of improper motivation" which was totally lacking in plaintiff's Age Discrimination Act theory. Again, the Court found it unnecessary and inappropriate to pass upon any of the threshold legal issues involving the construction and application of the Taft-Hartley Act and the Court expressed no opinion on those issues.

ARGUMENT

Plaintiff's factual claims are clearly insubstantial and do not justify the granting of the writ.

In affirming the decisions of the District Court in this matter, the Court of Appeals did not decide the legal questions raised by plaintiff's claims under the Age Discrimination in Employment Act and Section 302 of the Taft-Hartley Act. Rather, the Court treated only of the deficiencies in plaintiff's factual showing and, finding it insubstantial, approved the District Court's summary disposition of the complaint and amended complaint. Notwithstanding plaintiff's efforts to magnify the importance of the issues presented to this Court for review, plainly the instant petition should be denied. The record demonstrates conclusively that plaintiff's factual assertions are totally lacking in substance and therefore, as the Court of Appeals held unanimously, do not provide an adequate background against which to decide the legal issues of claimed importance.

With respect to the claims of alleged discrimination prohibited by the Age Discrimination Act, the Court of Appeals did not reach the threshold question whether the Act's proscriptions apply to allegations of improper administration of an otherwise *bona fide* pension plan. The appellate court expressly refused to consider whether the explicit statutory exclusion from the prohibitions of the Act for "a . . . pension . . . plan, which is not a subterfuge to evade the purposes of this chapter . . .," 29 U.S.C. §623(f)(2), applied to the instant Pension Trust. Instead, the Court of Appeals stated:

> "We put to [illegible]e whether this does not end plaintiff's [illegible] under [illegible]e Act and assume arguendo that the Act [illegible] improper administration of a bona fide pension plan." (A-34)

Even granting such an assumption, however, plaintiff's claims were so lacking in factual support as to make obvious on appeal the absence of any triable issue of fact.

Taking into account the legitimate and urgent reason for the Pension Plan's requirement that pensioners retire completely from the maritime industry and plaintiff's undisputed voluntary retirement from the industry, the Court of Appeals properly held that plaintiff had a burden to proffer facts which would support his alleged claims of discrimination and improper motivation by the trustees.

The Court quickly recognized that the "complete withdrawal" policy of the Pension Trust was a necessary safeguard to prevent the exhaustion of pension fund assets by those who did not intend to truly retire, but to use their pension benefits as a form of guaranteed income which would allow them free movement into and out of the maritime job market. If a pensioner could return to active employment whenever there was work available, or whenever he chose to return to work, and then return to pension status when work was unavailable, or when he decided to work ashore or not to work at all, a large number of eligible employees with 20 years of service would undoubtedly elect to receive pension benefits without actually intending to retire. In such event, the amount of funds in the Pension Trust available to pay pensions to employees who do retire and who do not seek to use the pension as a form of supplemental income or unemployment compensation would be substantially diminished. Thus, the Pension

Trust's regulations, in order to protect *bona fide* retirees and to prevent a vast increase in pension costs, have always precluded a return to employment without the permission of the trustees.

Moreover, the statement signed by plaintiff on the occasion of his retirement established beyond doubt that his retirement from the maritime industry was voluntary and with full awareness of the Pension Trust's regulations. Plaintiff never challenged—and does not now challenge—the legality of these regulations. And the Court of Appeals found that plaintiff's assertion that he had retired in reliance upon an alleged "swinging door" policy, pursuant to which a pensioner could freely go back and forth into covered employment, was completely contradicted by "the pension trust regulations and plaintiff's own signed statement of withdrawal . . . ." (A-34 n.6)

Plaintiff's renewed assertion here that the defendant trustees "manipulated and retroactively altered pension plan requirements" (Pet. 15)* is belied by the finding below that the trustees' 1970 resolution did not mark a change in regulations or a departure from pension plan policy, but simply enforced the regulations in effect when plaintiff retired in 1964. The Court of Appeals concluded that in attempting to resist summary judgment, "plaintiff simply stated a belief that the 1970 resolution was designed to discriminate against older workers without indicating the source of this belief," (A-35 n.8) and he could not rely on that unsubstantiated allegation to raise an issue of fact which merited a trial. Thus, the Court decided that plaintiff's failure to demonstrate the presence of a triable issue of fact necessitated dismissal of the complaint, without any consideration of the underlying legal issues.

---

* References to the Petition are cited as "Pet. ."

Applying the same reasoning, the Court of Appeals affirmed the dismissal of the Taft-Hartley Act claims without reaching the questions presented as to the proper scope of Sections 302(e)(5) and (c) of the Act.* In holding that the factual record also justified summary judgment against the claims in the amended complaint, the Court disavowed any interest in deciding the legal issues raised by the Taft-Hartley Act allegations:

> "In view of the insubstantiality of Plaintiff's case on the merits, we express no opinion on these issues." (A-35 n.9)

Plaintiff now protests that defendant never moved for summary judgment on the Taft-Hartley Act claims (Pet. 29), although the District Court, before its final decision in this case, plainly informed the parties that it was treating defendant's motion to dismiss the amended complaint "as one for summary judgment pursuant to Rule 56, F.R. Civ. P.," and gave both sides an opportunity to offer additional pertinent evidence. (A-16) In response to this invitation, plaintiff was able to offer only a meager piece of

---

* Notwithstanding plaintiff's contention that the narrow federal subject matter jurisdiction created by Section 302 of the Taft-Hartley Act should be extended to encompass his claims of alleged breach of fiduciary duties in the administration of the Pension Plan by defendant trustees, the Petition recognizes (Pet. 18-19, 21) that there is no conflict in the decisions of the lower courts and that plaintiff's position has been soundly and uniformly rejected. See, e.g. *Snider* v. *All State Administrators, Inc.*, 481 F.2d 387 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974); *Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); *Fiorelli* v. *Kelewer*, 339 F. Supp. 796 (E.D. Pa. 1972), *aff'd without opinion*, 474 F.2d 1340 (3rd Cir. 1973); *Sanders* v. *Birthright*, 172 F. Supp. 895 (S.D. Ind. 1959); *Moses* v. *Ammond*, 162 F. Supp. 866 (S.D.N.Y. 1958). The absence of any conflict among the Circuit Courts supplies an independent basis for the denial of the instant petition.

evidence in the form of a letter which, the Court of Appeals found, showed only that reinstatement of retirees was not practical given the financial structure of the pension plan. (A-36 n.10)

The Court of Appeals concluded that, even adopting plaintiff's expansive view of Section 302, plaintiff was required to make the same minimal factual showing of improper motivation on the part of the trustees as was necessitated under the Age Discrimination Act theory. The Court therefore determined that plaintiff's Taft-Hartley Act case "rests upon virtually the same inadequately substantiated allegations," and thus was beset by the very fatal defects which required dismissal of the Age Discrimination Act claim.

Plaintiff's failure to establish a sufficient factual basis to avoid summary judgment makes it manifest that the case at bar does not merit scrutiny by this Court. Before undertaking a review of the application and meaning of the two federal statutes involved here, the Supreme Court should have the benefit of the Court of Appeals' reasoned analysis and resolution of the legal issues presented. The Court should refrain from considering issues which are not sharply brought into focus by the facts of the case at hand. Simply put, the grant of certiorari should be reserved for a case where a meritorious factual claim is presented and where the complaint is not susceptible to early dismissal—as it was here—because of the plaintiff's failure to proffer more than mere bald and conclusory allegations.

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

EDWARD SILVER
Counsel for Respondents,
MEBA Pension Trust et al.
300 Park Avenue
New York, New York 10022

Dated: New York, New York
October 12, 1974

Of Counsel:

MORTON M. MANEKER
ROBERT J. JOSSEN
PROSKAUER ROSE GOETZ & MENDELSOHN

CERTIORARI DENIED